1961

Salt Lake County Cottonwood Sanitary District et al v. Clements T. Toone and Elmina S. Toone : Petition for Rehearing

Utah Supreme Court

Roy F. Tygesen; Attorney for Defendants and Appellants;

Case No. 9275

IN THE SUPREME COURT
of the
STATE OF UTAH

SALT LAKE COUNTY COTTONWOOD SANITARY DISTRICT, AN IMPROVEMENT DISTRICT, in Salt Lake County, by LAMONT B. GUNDERSON, EDWIN Q. CANNON, and ABRAM BARKER, its board of TRUSTEES.

Plaintiff and Respondent,

vs.

CLEMENTS T. TOONE and ELMINA S. TOONE, his wife,

Defendants and Appellants,

~~PETITION FOR~~
~~SECOND BRIEF OF APPELLANTS~~
REHEARING

ROY F. TYGESEN
Attorney for Defendants and Appellants.

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CLEMENTS T. TOONE and ELMINA S. TOONE, his wife,

Defendants and Appellants,

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PETITION FOR REHEARING

Comes now the above named Defendants and Appellants, and in support of their petition for rehearing, represent:—

1. That the Court failed to consider material points raised by Appellants, towit:—That summary judgement was improper since there was a material issue of fact that should have been passed upon by a jury, that is, did

Plaintiffs agree to restore to the Defendants their water lost?

2. That the Court erred in its conclusion that the measure of damage was "The fair market value, before and after water was lost."

3. That the equities in favor of permitting Appellants to present the matter for a jury's determination, far outweigh the saving resulting from summary judgement.

Dated this 22nd day of December, 1960.

Roy F. Tygesen — Attorney for Appellants and Defendants — 2968 South 8650 West, Magna, Utah. P.O. Box 206 — Phone Byron 7-6711

Received copy this 7th day of December, 1960.

FRED L. FINLINSON and
L. DELOS DAINES

By: .....
Attorneys for Plaintiff and Respondent.

AFFIDAVIT

Comes now ROY F. TYGESEN, and being first duly sworn on oath, says:—

1. That he is attorney for the above named Appellants and Defendants and has represented them for more than ten years.

2. That for more than ten years Defendants have planned on making an estate of the property here involved, and that Affiant has been consulted in all matters pertaining thereto, including title to the property, surveys, fencing, filing for water, permits, and even the Defendants sub-contracting the wrecking and moving the town of Garfield, Utah, to obtain materials for carrying out program of making an estate.

2. That for more than a year prior to Plaintiffs filing their suit in condemnation, Defendants refused to give right of way, till they were guaranteed that no water would be lost, or if it was, it would be restored.

3. That from July 17, 1957 when the suit was filed till the stipulation and right of way was granted, December 19, 1957, the condemnation proceedings were delayed till Plaintiffs attorneys and engineers could satisfy Defendants, no water would be lost, or if it was, it would be restored.

4. That Affiant, together with attorneys for Plaintiff, together with John M. Neff, engineer on the sewer project for Plaintiff, and the stenographer, were present

in the office of Fred L. Finlinson, when the stipulation was drawn.

That Affiant expressed his clients fear that the sewer line would act as a sewer drain and drain off all of Defendants water. In response thereto, John M. Neff advised that with modern engineering methods of sealing sewer trenches, not a drop of water would be lost, and if any was lost, it would be a simple matter to restore the same.

Based upon that representation the stipulation was executed, and with the definite understanding that Plaintiffs would restore to Defendants, any water lost; and if none was lost, the $1,000.00 would constitute full payment to Defendants, the right of way and damages.

5. That the delay from the time the stipulation was drawn and Plaintiffs installed their sewer line, which coincided with the time the water was lost, no action was had till pre-trial, held September 21, 1959, on the theory that the water would restore itself. That the delay from pre-trial to date of summary judgement notice, April 26, 1960, was for the same reason.

6. That Defendants "Response to Motion of Plaintiff to make more definite" setting out details of what it would cost Defendants to restore Defendants water lost, was at the instance and request of Plaintiffs.

7. That after the discovery that the water was lost, Affiant repeatedly consulted with Plaintiffs attorney, requesting that their engineer meet with Defendants, to

determine what steps could be taken to restore the water. Such meetings were repeatedly promised, but to date hereof, Plaintiffs engineers have never met with Defendants.

8. That the water developed, together with water in process of being developed, was necessary to conduct business of fish raising. That the present reduced amount is not sufficient to conduct fish raising program.

9. That your Affiant and Defendant have, all during the proceedings, and are now, concerned with the restoring of the water supply; and have, and do now, agree to permit Plaintiffs to make such experiments or research as they shall determine, to restore the water lost.

Witness the hand of Affiant this 22nd day of December, 1960.

ROY F. TYGESEN

Affiant

Subscribed and sworn to before me this 22nd day of December, 1960

E. G. PAULOS

Notary Public

Received copy this day of December, 1960

STATEMENT OF FACTS AND ARGUMENT

Appellants respectfully represent that this Court in its decision filed December 13, 1960, overlooked these points:

1. That the question of damages resulting from condemnation, that is, "The difference in market value of the property before and after the taking" had been fully disposed of by agreement between the parties, when the right of way was given, and the agreed amount of $1,000.00 paid.

To support that position, Defendant quotes paragraph two of the stipulation in full:

> "2. That the Plaintiff has paid to the Defendant the sum of one thousand dollars ($1,000.00), the receipt and adequacy of which is hereby acknowledged, in full payment for the aforementioned easement and right of way and in consideration of the Defendants' releasing all claims, causes of action and demands whatsoever that they have or may have against the Plaintiff, except as set forth in paragraph 3 thereof, and the Defendants do by these presents hereby release and discharge all claims, causes of actions and demands whatsoever against the Plaintiff they have or may have, except as set forth in paragraph 3 hereof, ARISING OUT OF, BUT NOT LIMITED TO, IN CONNECTION WITH THE LAYING OF SAID SEWER PIPE LINE IN AND ACROSS SAID PROPERTY, INCLUDING BUT NOT LIMITED TO ALL DAMAGES, IF ANY, SUFFERED BY THE DEFENDANTS WHEN PLAINTIFF ENTERED

UPON DEFENDENTS' LAND AND CONSTRUCTED A SEWER LINE, DAMAGES TO FENCES, CROPS, FAILURE TO RESTORE SURFACE TO THE CONDITION IT WAS PRIOR TO THE CONSTRUCTION, AND EVERY OTHER CAUSE EXCEPT AS SET FORTH IN PARAGRAPH 3 THEREOF.

The stipulation then goes on to set out paragraph three as quoted in the Courts decision. Reading the two together should clarify the meaning of both.

It is difficult for Counsel for Defendants' to imagine a more thorough and complete estoppel or defense to any action Defendants may have instituted for damages resulting from condemnation.

The foregoing was drawn by attorneys for Plaintiff, in the presence and with the approval and consent of attorney for Defendants.

It is the position of Defendants that the question of damages for condemnation, or, "the before and after rule," was fully disposed of by the foregoing, and such was the intent of the parties in drawing the stipulation.

The question of "the measure of damages to property not actually taken but affected by condemnation is the difference in market value of the property before and after the taking." is not before the Court.

2. Did the parties hereto have a definite understanding and agreement to have restored to Defendant, water lost?

Defendants submit there was such an agreement, and that the same should be enforced.

In the stipulation, paragraph three thereof, quoted in the Courts opinion —"There is reserved the right to the Defendants the question as to whether or not they have or will sustain any damages as a result of the loss of water —".

In view of the Courts statement in its decision handed down December 13, 1960, saying "In spite of Defendants' efforts to the contrary, we do not see how the language of that paragraph can be tortured into meaning anything other than that the existing law shall be ascertained and applied to the problem at hand—"

Counsel for Appellants, filed his Affidavit, to attempt to clarify paragraph three of the stipulation.

At the time Plaintiff installed the sewer line, Defendants ponds A & B, containing the springs, were already excavated and filled. Plaintiff ran its sewer line within thirty feet and parallel to these two ponds. Plaintiff was advised and knew that Defendants proposed using these ponds for the raising of fish at the time. (Tygesen Affidavit PP. 2-8) (Gunderson Affidavit para. 2-3-4)

Commissioner Gunderson, who was then Chairman of the Board of Trustees of Plaintiff sewer company, in his Affidavit, has this to say "6 It was further agreed that if it afterwards was established that the sewer line, did deprive the said Toone of water available to him from said spring areas, that the said district would RE-

STORE HIM TO HIS FORMER POSITION AS TO SUCH WATER, if and when such loss of water was established." (Gunderson Affidavit paragraph 6)

By reason of summary judgement, Defendants were never able to establish that loss in Court proceedings, and prior to the time, Gunderson had been replaced as Trustee of the District.

That 47/100 second foot of water was lost is shown by affidavits of R. B. McAllister, Jesse Hulse and David Toone, (See Appellants original brief pages 12-16)

Defendant Toone in his deposition taken by Plaintiff, had the following to say:

(Page 33 — line 16-18) In discussing the problem with Gardner, one of Plaintiffs engineers of the project:

> "I asked him if there was some other way they could by-pass that (Defendants land) so they wouldn't destroy my water rights."

(Tr. Page 59—line 21-30) (Tr. page 60 — line 1-6)

> "Q. If we went in there and dug down at the edge of the Peters property and put down the same kind of clay bank it would have the same effect as the one put down at the junction by pond B and you would recapture your water, is that right?
>
> Toone—A. Mr. Daines, all the way along the line we have been open for suggestions and I have never turned you down on going on the property. You can come there and make any study you want".

Daines—Q. Make any tests we want?

Toone—A. Make any tests you want.

Daines—Q. If we want to dig down and bare our line and make—

Toone—A. That is right. If you can correct this (loss of water) that is what I am after"

Daines—Q. Is it your opinion if you put the same kind of dam, a clay dam across the property adjacent to the Peters property that it would correct the condition? (loss of water)

Toone—A. Mr. Daines I don't know and I will tell you why. I don't know where feeders of those springs are. If they are underneath your sewer I don't know whether we can bring it to the top with a dam of that kind or not." (Referring to spring area springs—not those in bottom of ponds)

(TR. page 63-line 11-12) Daines—Q. You told them at that time Mr. Gardner and Mr. Neff (Plaintiffs engineers) if they would pay the costs of drilling a well, and this proposed well number 1, that that would compensate you for any damages you sustained from loss of water?

Toone—A. Mr. Daines that is misleading.

Daines—Q. Did you say that or didn't you?

Toone—A. I made them the offer if they would drill the wells at that time I would call the thing off. And I had the idea I could get wells from —you know—without any trouble, for that purpose. (fish raising) But when we went for the permit for the wells all we could get them for is culinary use. They won't give it to us for the other."

(TR. page 76—lines 23-24) Toone—"A. Fred (Finlinson) the damage is to put it (water lost) back, is what we are asking for".

(TR. page 90—lines 18-25) Daines—"Q. If you should put a bank between your property and the Keller property, clay bank in there, that would take care of any—

Toone—A. No, it could all the way along in here (indicating) I don't know where to put it. That is why I invited you fellows to come in and help me decide what to do. But you have got to have a water engineer. McAllister will find where that water is going."

Throughout the entire proceedings, both before the sewer was installed and since, the interest of all parties was directed to the agreement that the water would be restored.

The question of restoring the lost water is the issue before the Court, and the only issue. For that reason counsel for Defendants, before Judge Ellett, determined to stand on that point, without amending the pleadings.

To that effect, and long before Judge Elletts ruling, Counsel for Appellants, while present at taking of Toone deposition, said,

"Mr. Tygesen: Mr. Daines, to clarify our position, I might expedite and save time here: The theory of our suit is not condemnation. The theory of our suit is that you were given the right of way for an agreed price. Our suit now is based on the theory of putting us back in status quo prior to the time you were in there."

"Mr. Daines: I appreciate that but you let me pursue my theory." (TR. page 45—lines 3-10)

If the sole purpose of the action was not the restoring of water lost, why the stipulation? Why wait from the middle of June 1957, when the sewer went through and loss of water discovered (TR. page 14—lines 26-27) till 1959 to see if water table would return?

When Plaintiff failed to make the least effort to restore the water, other than making repeated promises to have their engineers meet with Toone, which was never done, (Tygesen Affidavit paragraph 7-9) (Tr. Page 59—lines 25-28) (Tr. page 90—lines 21-25) Defendants assumed Plaintiffs were not going to live up to their agreement, so spent considerable time obtaining information as to what it would cost Defendants to restore the water, and restore his property and ponds to status quo. Defendants then set it out in detail in Defendants "Response to Motion of Plaintiff to make more Definite." However Defendants still would prefer that Plaintiffs live up to their agreement, and they restore the water.

CONCLUSIONS

A. The Court below erred in entering summary judgement, and this Court in sustaining said judgement.

B. The Court below erred in determining the case on the "Before and After" rule.

C. That the damages from condemnation had al-

ready been taken care of by agreement of the parties, and was not before the Court.

D. The correct issue in the case is the enforcement of the agreement between the parties to restore Defendants their water lost.

E. That Plaintiffs should be required to restore Defendants to their former condition as to water lost, seepage corrected and restore burnt out area; or in the alternative,

G. Reimburse Defendants for their expense in so doing.

Respectfully submitted

ROY F. TYGESEN
Attorney for Appellants

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TEXTS